RECENT DECISIONS.

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ACTION FOR PENALTY—CONVICTION BY PREPONDERANCE OF EVIDENCE.—In an action to recover a statutory penalty, *held,* preponderance of evidence is sufficient to sustain a conviction. *United States* v. *Regan* (U. S. Sup. Ct. 1914) Not yet reported.

For a discussion of the general nature of an action for a penalty, see 14 Columbia Law Rev. 79. The federal courts have applied in the trial of such actions many of the constitutional safeguards accorded to persons accused of crime. See 13 Columbia Law Rev. 529; 14 Columbia Law Rev. 79. The tendency of the Supreme Court, however, see *Lilienthal's Tobacco* v. *United States* (1877) 97 U. S. 237, 272, has been to depart from the rule of proof beyond reasonable doubt, suggested in *United States* v. *The Brig Burdette* (1835) 9 Pet. 682, and in *Chaffee* v. *United States* (1873) 18 Wall. 516, and the holding in the principal case, which finally lays this phase of the question at rest, is supported, as the opinion points out, by the great weight of authority in the state courts and the inferior federal courts.

ADMIRALTY—MARITIME CONTRACTS.—The services of a watchman, rendered to a vessel while laid up for repairs, with the master discharged, *held,* not a maritime service. *The Fortuna* (D. C. 1913) 206 Fed. 573.

Respondent, who had contracted to supply all of libellant's steamers with bunker coal, failed on one occasion to do so. *Held,* that the contract was not maritime. *S. S. Overdale Co.* v. *Turner* (D. C. 1913) 206 Fed. 339.

The maritime nature of the subject matter, which is the usual test of admiralty jurisdiction, *Boutin* v. *Rudd* (C. C. A. 1897) 82 Fed. 685, and the distinction between maritime contracts and contracts merely preliminary to maritime services, see *The Wivanhoe* (D. C. 1886) 26 Fed. 927; *The Paola R.* (C. C. A. 1887) 32 Fed. 174, have been fairly delineated in the case of watchman's services by distinguishing between situations where the vessel had finished her voyage, and cases where the services when rendered were necessary for the successful completion of the voyage. *The Erinagh* (D. C. 1881) 7 Fed. 231. Contracts for supplies, however, have not been so satisfactorily adjudicated. Thus, where the supplies are furnished on shore to the crew as individuals merely, *The Mary F. Chisholm* (D. C. 1904) 129 Fed. 814, or where, as in the principal case, the supplies are to be furnished to a company and merely measured by the requirements of a number of vessels, *Diefenthal* v. *Hamburg Amer. Line* (D. C. 1891) 46 Fed. 397, there is no ground for admiralty jurisdiction, but these cases are not to be taken as establishing a rule broader than their facts warrant. If the supplies are to be furnished to a particular ship for the necessities of her voyage, so that the performance of the contract would give a maritime lien, it would seem that the contract, while still executory, should be cognizable in admiralty. There is, however, a curious lack of authority to this effect. The case of *The Electron* (D. C. 1891) 48 Fed. 689, although perhaps distinguishable on the ground that the executory contract there recovered upon was a cross-libel to a libel on an executed contract which had already brought the parties and the *res* into court,

nevertheless tends to support this view, as do *dicta* in *The Pacific* (C. C. A. 1850) 1 Blatchf. 569, 588, and *The Cabarga* (C. C. A. 1853) 3 Blatchf. 75, 77. Certainly, as a general rule, if the contract is admittedly maritime, the mere fact that it is still executory does not oust admiralty jurisdiction. *Baltimore Steam Packet Co.* v. *Patterson* (C. C. A. 1901) 106 Fed. 736.

APPEAL AND ERROR—JURISDICTION OF THE NEW YORK COURT OF APPEALS. The Appellate Division entered a judgment without disclosing the grounds thereof, reversing a judgment of the Supreme Court on the verdict of a jury, and an order of the Trial Term denying a motion for a new trial. *Held,* the Court of Appeals could not review the decision. *Wright* v. *Smith* (1913) 209 N. Y. 249.

Since the Court of Appeals has no jurisdiction to pass upon questions of fact, except in criminal causes, Constitution of New York, Art. 6, § 9, it is essential that the determination of the facts be final before that court is reached. If a case was first tried without a jury, an appeal from the judgment below gives the Appellate Division an opportunity of passing upon both law and fact and rendering a decision consistent with the rights of the parties. Code of Civ. Proc. § 993. Unless the order of the Appellate Division clearly shows that the holding was based on its view of the facts, it is presumed that its conclusion rested upon issues of law. Code of Civ. Proc. § 1338; *McKinley* v. *Hessen* (1911) 202 N. Y. 24; *Hirshfield* v. *Fitzgerald* (1898) 157 N. Y. 166. If, however, the initial trial was had before a jury, an appeal from a judgment entered upon the verdict raises only questions of law upon the exceptions taken at the trial, Code of Civ. Proc. § 1346; *Collier* v. *Collins* (1902) 172 N. Y. 99; *Alden* v. *Knights of Maccabees* (1904) 178 N. Y. 535, and an issue of fact can be reconsidered only by an appeal from an order granting or denying a motion for a new trial. *Thurber* v. *Harlem B. M. & F. R. R.* (1875) 60 N. Y. 326; *Boos* v. *World Mutual Life Ins. Co.* (1876) 64 N. Y. 236. But since, upon an appeal to the Appellate Division from both a judgment and an order, there may be a reversal upon the law, without a consideration of the facts, the Court of Appeals very technically requires as a prerequisite to its assumption of jurisdiction that the order of the Appellate Division affirmatively indicate that the order below was affirmed as to facts, *Duryea* v. *Zimmerman* (N. Y. 1908) 123 App. Div. 805; *Allen* v. *Corn Exchange Bank* (1905) 181 N. Y. 278; Cardoza, Juris. of Ct. of Appeals (2nd ed.) § 19, lest a final disposition by the Court of Appeals deprive one of the parties of his right to have the facts reviewed.

BANKRUPTCY—CONTINGENT CLAIMS—PROVABILITY.—A landlord, on the bankruptcy of his tenant, seeks to prove a claim for rent for the entire term. *Held,* he could not prove for rent accruing subsequent to the filing of the petition in bankruptcy, but could enforce a lien for a year's rent imposed by a state statute on the tenant's property on the leased premises. *In re J. Sapinsky & Sons* (D. C. W. D. Ky. 1913) 206 Fed. 523.

The plaintiff was employed under a year's contract at a stipulated weekly wage. Before the expiration of the contract his employer became bankrupt. *Held,* the plaintiff could not prove a claim for installments of salary unearned at the time of filing the petition. *In re D. Levy & Sons Co.* (D. C. D. Md. 1913) 208 Fed. 479. See Notes, p. 158.

BANKRUPTCY—DISCHARGE OF BANKRUPT—OBTAINING PROPERTY BY FALSE PRETENSES.—The plaintiff, who had been induced to become surety for the bankrupt by false representations as to his financial standing, seeks to bar his discharge on the ground that he had obtained property by false representations under Sections 17a(2) and 14b(3) of the Bankruptcy Act. *Semble,* this was not obtaining property within the meaning of these sections. *In re Dunfee* (D. C. 1913) 206 Fed. 745.

In general bankruptcy law "property" is said to include "anything of value, anything which has a debt-paying or debt-securing power", see *In re Louisville Nat. Banking Co.* (C. C. A. 1908) 158 Fed. 403, and as regards the transfer of property to the trustee the word is given a broad scope both by the federal law and by the English Bankruptcy Act. See Collier, Bankruptcy (9th ed.) 16. Although the obligation of a surety would seem to fall within this definition, there is authority for the proposition that "property" is used in sections 17a(2) and 14b(3) in a sense synonymous with its use in criminal law. See *Gleason* v. *Thaw* (C. C. A. 1911) 185 Fed. 345. But the argument that the addition of the words "money or" before "property" by the amendment of 1910 reveals an intention to limit the meaning of "property", see *In re Tanner* (D. C. 1911) 192 Fed. 572, is not conclusive, inasmuch as it might as well be argued that Congress merely sought to repudiate the decisions holding that "property" did not include "money". See *In re Pfaffinger* (D. C. 1907) 154 Fed. 528. At any rate, if the court is to give effect to the purpose of the act, the conclusion cannot be avoided that this is obviously an evil which it sought to remedy, since the surety has been deprived of money by the defrauding bankrupt, who has ultimately acquired direct benefits therefrom. As a practical matter, the situation is the same as if the surety had himself in the first instance advanced the money to the principal, and the interpretation given by the court in the main case, although apparently within the strict words of the sections, leaves irremediable those cases where protection is most needed.

BANKS AND BANKING—JOINT AND ALTERNATE DEPOSITS.—Money was deposited "payable to A or B. Pay to either or the survivor of either." B withdrew the entire amount and redeposited it in her own name without A's consent. After B's death, A sued the bank, which interpleaded B's executor. *Held,* one judge dissenting, the original deposit had been held jointly, and the plaintiff's interest had not been divested by B's withdrawal and redeposit. *O'Connor* v. *Dunnigan* (App. Div. 1913) 143 N. Y. Supp. 373.

While in some jurisdictions such deposits have been given effect as a trust in favor of the person named as co-depositor, *Booth* v. *Oakland Bank of Savings* (1898) 122 Cal. 19, in others the courts look to see whether the original depositor intended to make a gift of a joint interest in the deposit, and hence, in harmony with the general principles of the law of gift, require that the pass book be delivered to the donee. See *Gorman* v. *Gorman* (1898) 87 Md. 338; *Savings Bank* v. *Merriam* (1895) 88 Me. 146. The principal case concerns itself with the question whether the mere form of the account is sufficient to indicate an intent to create an estate in joint tenancy, see *Farrelly* v. *Emigrant Ind. Sav. Bank* (N. Y. 1904) 92 App. Div. 529; but see *Kelly* v. *Beers* (1909) 194 N. Y. 49, apparently not noticing that the New York Banking Law, § 144, expressly gives it that effect. *Cf.* California Banking Law (1909) § 16; Mich. L. (1909) #248, § 3. It seems clear,

then, that during the joint lives of the depositors either had an equal right to draw the money, see *Moore* v. *Fingar* (N. Y. 1909) 131 App. Div. 399, and it may be urged that the disjunctive form of the deposit would carry with it the right of either party to appropriate a reasonable amount of the fund to his own personal use. It would seem, however, that the parties could not have meant that either could withdraw the deposit with the sole purpose of divesting the other of his interest, and certainly such an act of ouster is not within the legal power of a joint tenant. Freeman, Co-tenancy (2nd ed.) §§ 312, 313. As against B's executor, therefore, A was clearly entitled to the deposit.

CARRIERS—DEMURRAGE CHARGES—LIEN.—A contract of shipment provided that should the consignee delay unloading more than 48 hours, the carrier should thereafter be entitled to reasonable charges for storage, though the goods remained in the cars; and its liability should be reduced to that of a warehouseman. *Held,* two judges dissenting, the carrier was not entitled to a lien for the storage charges which thus accrued. *Troy Waste Mfg. Co.* v. *N. Y. C. & H. R. R.* (App. Div. 1913) 143 N. Y. Supp. 420.

Where goods shipped are not at once removed by the consignee, it is often convenient to leave them in the cars rather than store them in a warehouse. According to the weight of modern authority a carrier is entitled in such cases, even in the absence of an express agreement, to charge reasonable demurrage rates after the expiration of a reasonable time for the removal of the goods. 9 Columbia Law Rev. 617. Since, also, after such time, the carrier is under only a warehouseman's liabilty, *Rice* v. *Hart* (1875) 118 Mass. 201, the analogy of its position to that of a warehouseman would seem sufficiently complete to justify the courts in according to it a warehouseman's lien for demurrage charges; and so is the weight of authority. *Kaweabany* v. *B. & M. R. R.* (1908) 199 Mass. 586; see *Schumacher* v. *Chicago R. R.* (1904) 207 Ill. 199. Some jurisdictions, however, in accord with the principal case, hold that as no such lien existed at common law, its recognition would amount to judicial legislation. *Nicolette Lumber Co.* v. *Coal Co.* (1906) 213 Pa. 379; *Crommelin* v. *N. Y. & Harlem R. R.* (N. Y. 1868) 4 Keyes 90. The principal case may perhaps be sustained on the ground that since the parties made express provision for demurrage charges, they would presumably have made similar provision for a lien had they intended to create one; or that the New York statute relating to warehousemen's liens applies only to those engaged exclusively in the warehouse business. See *Merritt* v. *Peirano* (N. Y. 1896) 10 App. Div. 563; affd. (1901) 167 N. Y. 541.

CONFLICT OF LAWS—DOMICILE—EXECUTION OF POWER BY WILL.—The deceased, domiciled in Italy at her death, was donee of a power of appointment over personalty, vested in her under the will of a resident of New York. She executed a will which was a valid exercise of the power under the laws of New York but not under those of Italy. *Held,* the power was properly exercised. *In re N. Y. Life Ins. & Trust Co.* (1913) 209 N. Y. 79.

The Trial Court in 139 N. Y. Supp. 695, see 13 Columbia Law Rev. 160, found that as a matter of fact the deceased intended to have the law of New York and not the law of her domicile govern the execution of the power. After an affirmation without opinion by the

Appellate Division, 157 App. Div. 916, the case was carried to the Court of Appeals, in which the views of the Surrogate were approved, but in which it was deemed preferable to rest the result upon the theory that as a matter of law the execution of such a power was to be construed by the law of the domicile of the donor.

CONTEMPT—POWER OF COURTS—LETTER TO JUDGE PENDING SUIT.—The defendant wrote to a federal judge libelous and threatening letters with reference to a case not yet finally disposed of. *Held,* such letters constituted a contempt of court under Judicial Code § 268, Rev. St. § 725. *United States* v. *Huff* (D. C. Ga. 1913) 206 Fed. 700. See Notes, p. 160.

CONTRACTS—DEFENSES—RESTRAINT OF TRADE.—The plaintiff purchased the good will of a rival opera house. The defendant, a confidential employee of the vendor, covenanted in consideration of such purchase to refrain from the production of grand opera in New York and Boston for ten years. *Held,* the covenant was not against public policy. *Metropolitan Opera Co.* v. *Hammerstein* (N. Y. Sup. Ct. 1913) N. Y. L. J., Dec. 8, 1913. See Notes, p. 151.

COPYRIGHTS—RIGHT TO FIX RESALE PRICE—SHERMAN ACT.—The defendant association, acting under an agreement whereby its members contracted not to sell copyrighted books to anyone who cut prices fixed by them, refused to allow its members to sell to the plaintiff, who applied for an injunction. *Held,* the agreement was violative of the Sherman Anti-Trust Act and not justified by the Copyright Act. *Straus* v. *American Pub. Assn.* (1913) 34 Sup. Ct. Rep. 84.

It has been held that a patentee can make regulations as to the use of his article in a purchaser's hands, even though the exercise of this right virtually entails the control of unpatented articles. *Henry* v. *Dick Co.* (1912) 224 U. S. 1; 12 Columbia Law Rev. 445. He has, however, no right by virtue of his patent to regulate the resale price of his article, *Waltham Watch Co.* v. *Keene* (D. C. 1913) 202 Fed. 225; 13 Columbia Law Rev. 445; *Bauer & Cie* v. *O'Donnell* (1913) 229 U. S. 1; 13 Columbia Law Rev. 632, although this rule is apparently irreconcilable with the stand formerly taken by the Supreme Court. *Bement* v. *Natl. Harrow Co.* (1902) 186 U. S. 70. Similarly, it has been held that a copyright holder has no right to control future sales of his article. *Bobbs-Merrill Co.* v. *Straus* (1908) 210 U. S. 339; 6 Columbia Law Rev. 50. When, moreover, patentees combine and subject themselves to certain rules in regard to the sale of their respective articles, such a combination is clearly beyond the authority conferred by the patent statute, *Natl. Harrow Co.* v. *Hench* (C. C. A. 1897) 83 Fed. 36; *Standard Sanitary Mfg. Co.* v. *United States* (1912) 226 U. S. 20, and is therefore subject to the Sherman Act. *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.* (C. C. 1909) 166 Fed. 555; 9 Columbia Law Rev. 536. Combinations between holders of various copyrights, whereby competition is eliminated, likewise contravene the Anti-Trust Act, and since there is no inherent distinction between the rights given under the patent and under the copyright laws in respect to sales, see *Waltham Watch Co.* v. *Keene, supra; Bauer & Cie* v. *O'Donnell, supra,* it would follow that the copyright act, as the main case properly holds, also affords no protection.

CORPORATIONS—ALIENATION OF PROPERTY—RIGHTS OF MINORITY STOCKHOLDERS.—Although he had consented to a transfer to another grantee, a minority stockholder sought to set aside a transfer of all the property of the corporation, which had no further means of carrying out its original purpose, to another concern having the same directorate. *Held,* in the absence of express proof of fraud, he was not entitled to relief. *Cummings* v. *Parker* (Mo. 1913) 157 S. W. 629.

The interest of the public in the continuance of a quasi-public function, which properly prompts a state to prevent a practical dissolution of a public service corporation by the alienation of all its property, 6 Columbia Law Rev. 459, evidently does not similarly restrict a private trading corporation. While the majority in such a corporation, however, may bind the minority by acts in furtherance of the business, a dissenting stockholder may object to a complete transfer on the ground that he was thereby deprived of his property, since the corporation is no longer in a position to carry on the pursuit for which it was organized. *Keene* v. *Johnston* (1853) 9 N. J. Eq. 401; see *Abbott* v. *American Hard Rubber Co.* (N. Y. 1861) 33 Barb. 578; *Treadwell* v. *Salisbury Mfg. Co.* (Mass. 1856) 7 Gray 393. Although such a contention would support an injunction against a going corporation which is seeking to transfer all its property, if the business is run at a loss, a conveyance pursuant to a majority vote could be justified as in the best interest of the corporation. *Price* v. *Holcomb* (1893) 89 Ia. 123; see *Bartholomew* v. *Derby Rubber Co.* (1897) 69 Conn. 521. And, indeed, though a common directorate is by many authorities held sufficient to avoid such an intercorporate agreement, apparently fair, upon the theory that a fiduciary violates his duty by contracting with himself, the preferable view only subjects such transaction to a closer scrutiny in search of actual fraud. 13 Columbia Law Rev. 164; 8 Columbia Law Rev. 313.

CORPORATIONS—SITUS OF STOCK—TRANSFER OFFICE IN A FOREIGN JURISDICTION.—A suit was brought by the resident executor of the will of a non-resident, to compel the transfer of stock in a foreign corporation, which had a transfer and registry office within the jurisdiction. *Held,* the maintenance of a transfer office constituted a domicile of the corporation *pro tanto* within the jurisdiction, and since the certificates of stock were in the state, the court could order them to be transferred. *Lockwood* v. *U. S. Steel Corp.* (1913) 209 N. Y. 375.

A share of stock, which is simply the sum of the stockholder's abstract rights and liabilities in the corporation, Lowell, Transfer of Stock, § 4, may be conceived, for various purposes, as having a situs either in the state of incorporation or in the state of the owner's domicile. 1 Cook, Corporations (6th ed.) §§ 12, 13; but see *Miller's Estate* v. *Executrix of Miller's Estate* (Kan. 1913) 136 Pac. 255. The location of the certificate, which is only evidence of the existence of the rights, *Richardson* v. *Busch* (1911) 198 Mo. 189; Elliot, Private Corporations (4th ed.) § 304, is theoretically of no materiality. *Maertens* v. *Scott* (1911) 33 R. I. 345; *cf. Puget Sound Nat. Bank* v. *Mather* (1895) 60 Minn. 362. The courts, however, have generally regarded the certificates as property, *Merrit* v. *American Co.* (C. C. A. 1897) 79 Fed. 228, 235; see 1 Beach, Private Corporations, 387, and have shown, as well, some tendency to adopt the layman's identification of the certificate with the stock itself. *In re Clark,* L. R. [1904] 1 Ch. 294; see *Simpson* v. *Jersey City Contracting Co.* (1900) 165

N. Y. 193; but see *Maertens* v. *Scott, supra.* It would seem, however, that even though, as a consequence of such a tendency, the physical presence of the certificate might be enough to base administration upon, nevertheless, it would not, alone, be sufficient to justify the result reached in the principal case, inasmuch as the New York statute expressly distinguishes between the rights in the document and the rights evidenced thereby. N. Y. Genl. Construct. Law, § 39; *cf. Simpson* v. *Jersey City Contracting Co., supra.* Although, however, a corporation exists technically as an entity only within the state of its creation, see *Bank of Augusta* v. *Earle* (1839) 13 Pet. 519, 588, and the existence of a business office within a foreign jurisdiction does not bring the stock within the state for purposes of attachment, *Plimpton* v. *Bigelow* (1883) 93 N. Y. 592, 598, yet the courts have shown an inclination to diverge from this technical rule, and to recognize that a state can, if it so chooses, concede to a foreign corporation a domicile for certain purposes within its jurisdiction. See *Morgan* v. *Mutual Benefit Life Ins. Co.* (1907) 189 N. Y. 447; *New England Mutual Life* v. *Woodworth* (1884) 111 U. S. 138; *cf.* 2 Columbia Law Rev. 351. The principal case, therefore, is to be supported, if at all, upon the theory that the maintenance of an office for stock transfers within the state shows an intention to acquire, to that extent, a domicile therein; and that for the sake of possible convenience and the protection of citizens, the court may recognize this domicile, thus expanding the administrator's property from a mere evidentiary instrument into the substantial right which it represents.

CRIMINAL LAW—EVIDENCE DISCLOSING INDEPENDENT OFFENSES—ELECTION BY THE STATE.—An information charging the defendant with a misdemeanor contained only one count, while the evidence disclosed several offenses, any one of which would sustain a conviction. *Held,* it was error not to require the state, upon motion by the defendant, to elect upon which offense it would seek to convict. *Golden* v. *State* (Tex. 1913) 160 S. W. 957.

In felony cases the early common law refused to allow different counts in an indictment where they applied to different transactions, see 1 Bishop, Crim. Proc. (2nd ed.) § 459 (1); see 1 Wharton, Crim. Ev. (10th ed.) § 49; *Womack* v. *State* (Tenn. 1870) 7 Cold. 508. But there is no inherent injustice in compelling the defendant to answer to a charge wherein two or more distinct misdemeanors are joined in separate counts. 1 Bishop, Crim. Proc. (2nd ed.) § 452 (1); see *People* v. *Costello* (N. Y. 1845) 1 Denio 83. From the fundamental principle that evidence cannot be introduced to show the commission of any crime but that with which the defendant is charged and for which he is on trial, see Underhill, Crim. Evid. (2nd ed.) § 87, it follows that the evidence must be confined strictly to the proof of the crime or crimes set out in the counts. Hence, it is clearly the duty of the court to require the state to elect upon which one of several acts similar to the one charged it shall proceed. In felony cases this rule has been adhered to, 1 Bishop, Crim. Proc. (2nd ed.) §§ 457 (2), 459 (1); see *People* v. *Castro* (1901) 133 Cal. 11, but many courts have denied the authority of the defendant to compel an election in misdemeanor cases, *Williams* v. *State* (Tex. 1906) 97 S. W. 498; *cf. State* v. *Groves* (1899) 21 R. I. 252; *Cody* v. *State* (1903) 118 Ga. 784, on the theory that in any event it is a matter of pure discretion. See 1 Bishop, Crim. Proc. (2nd ed.) § 454 (2);

Womack v. *State, supra.* Strict principle should demand that the court preserve the defendant's right to be apprised of the specific crime against which he must defend. Such a rule, moreover, works no hardship on the state, since by a mere joinder of the separate misdemeanors it can proceed to prove them.

DAMAGES—BREACH OF CONTRACT.—The plaintiff purchased infected meat from the defendant, and exposed it for sale. The meat was condemned by the authorities, and the plaintiff was fined. In a suit for damages, to include not only the amount of the fine with costs, but also the loss inflicted upon the plaintiff by diminution of his business arising from the conviction, *held,* such damages were not too remote, and were recoverable upon an implied warranty. *Cointat* v. *Myham & Son* (1913) 108 L. T. Rep. 556. See Notes, p. 154.

DAMAGES—EVIDENCE—ASSESSMENT AFTER DEFAULT.—In proceedings after default to assess damages to a mortgagee for conversion of the mortgaged chattel, the defendant in mitigation of damages offers evidence of the satisfaction of the mortgage before the time of the default. *Held,* admissible. *Graves* v. *Cameron* (N. C. 1913) 77 S. E. 841.

Formerly, the defendant was not permitted to introduce facts in mitigation of damages on assessment after default, and was illogically limited to cross-examination of the plaintiff's witnesses. *Morton* v. *Bailey* (1835) 2 Ill. 213. In accordance with the sound rule that a default admits only well pleaded facts, and that damages are conclusions of law, the defendant is now allowed to show any circumstances tending to reduce the amount claimed in the declaration. In consequence of the application of this principle, however, various jurisdictions have adopted arbitrary rules which are maintained simply for the sake of uniformity in procedure. *Bridges* v. *Stephenson* (1882) 10 Ill. App. 369; *Batchelder* v. *Bartholomew* (1877) 44 Conn. 494. All courts allow at least nominal damages on default. See *Batchelder* v. *Bartholomew, supra.* Logically, only those circumstances should be admitted in evidence which show the extent of damages, but none which tend directly to overthrow the cause of action. *Brown Construction Co.* v. *McArthur Bros.* (1911) 236 Mo. 41; *Foster* v. *Smith* (N. Y. 1833) 10 Wend. 377. When the offer is to prove facts in avoidance of the cause of action, much confusion exists, but on principle, they should be excluded, because although apparently in mitigation, they tend directly to destroy the cause of action. They are, however, generally admitted because of practical hardship. *Bridges* v. *Stephenson, supra;* see *Parker* v. *House* (1872) 66 N. C. 374. An exception should be made where the defense accrues after the default has been entered; this would avoid circuity of action and render such a plea a matter of right and not of grace. See *Ewing* v. *Park* (1850) 17 Ala. 339. Although the principal case contends for this exception, on the facts it cannot apply, as the mortgage was satisfied two months before the default was entered.

EMINENT DOMAIN—EXTENT OF INTEREST ACQUIRED IN CONDEMNED LAND.—In a controversy between the prior owner of land which had been condemned for railway purposes but which the condemner had ceased to use for such purposes, and the railroad's grantee, *held,* although the statute provides that a fee should vest in the condemner,

the latter acquires only a determinable fee. *Lithgow* v. *Pearson* (Colo. C. A. 1913) 135 Pac. 759.

It is well settled that where the legislature defines the interest which shall be taken by an exercise of the power of eminent domain, a lesser interest than that specified or a greater one cannot be taken. Lewis, Eminent Domain (3rd ed.) Vol. II, p. 813. Where, therefore, a statute which apparently does not define the interest to be taken is construed by the court as doing so, the condemning corporation in every proceeding brought to acquire land under the statute can take only that kind of an estate which the courts construe the statute as authorizing. *Currie* v. *N. Y. Transit Co.* (1904) 66 N. J. Eq. 313; *Sweet* v. *Buffalo, etc. Ry.* (1879) 79 N. Y. 293. As this interest or estate is always the smallest possible, consistent with the language of the act, public service corporations are often practically deprived of the assistance the legislature evidently intended they should enjoy, since to exercise the power of eminent domain would merely result in acquiring a highly undesirable title. *Cf. Hudson & Manhattan R. R.* v. *Wendel* (1908) 193 N. Y. 166. It would seem, therefore, that a preferable result would be reached by construing such statutes as permitting the taking of one kind of an estate or another, according to the reasonable demands of the use to which the land is intended to be devoted. *In re N. Y. & H. R. R.* v. *Kip* (1871) 46 N. Y. 546; *Smith Canal or Ditch Co.* v. *Colo. Ice & Storage Co.* (1905) 34 Colo. 485; *McEwan* v. *Penn. R. R.* (1905) 72 N. J. L. 419; *Newton* v. *Newton* (1905) 188 Mass. 226. Indeed, the statute in the principal case undoubtedly prescribes the kind of estate which could be taken, but where a statute provides for the taking of a fee, it is usually construed as meaning fee simple absolute. See *Higginson* v. *Treasurer, etc., of Boston* (1912) 212 Mass. 583; but see *In re Clinton Police Station* (1910) 123 N. Y. Supp. 198.

EVIDENCE—CORROBORATION OF A WITNESS—PREVIOUS STATEMENTS.—In order to corroborate the testimony of an accomplice who had a motive to falsify by reason of a promise of immunity upon his turning state's evidence, the district attorney offered a typewritten statement, made prior to the promise. *Held,* it was admissible. *People* v. *Katz* (N. Y. 1913) 103 N. E. 305.

This conclusion is in accordance with the weight of authority, which permits the admission of such statements when made before the creation of any motive which might prompt them. See 13 Columbia Law Rev. 167.

EVIDENCE—FORMER SIMILAR ACTS.—Under an indictment for statutory larceny, the prosecution offered testimony tending to show that the defendant had been previously implicated in similar questionable transactions. *Held,* the evidence was admissible to show guilty knowledge. *People* v. *Katz* (N. Y. 1913) 103 N. E. 305.

For a discussion of the principles involved, see 2 Columbia Law Rev. 40.

EVIDENCE—VALUE OF LAND—ADMISSIBILITY OF PRICE PAID FOR ADJOINING PROPERTY.—In an action for the assessment of damages in eminent domain proceedings, the plaintiff offered testimony as to the prices paid for land in the vicinity. *Held,* the evidence was admissible. *East Shore Land Co.* v. *Metropolitan Park Comm.* (R. I. 1913) 86 Atl. 894.

On cross-examination of witnesses to value, the plaintiff excepted

to questions as to the selling prices of neighboring property. *Held,* exceptions sustained. *Roberts* v. *City of Philadelphia* (Pa. 1913) 86 Atl. 926.

Direct evidence of the actual sale of, as distinguished from offers to buy, property of a similar character, *Sherlock* v. *Chicago, B. & Q. R. R.* (1889) 130 Ill. 403, is generally admitted to establish the market value of the specific parcel in question. *St. Louis etc. Ry.* v. *Clark* (1893) 121 Mo. 169, 185; *Town of Cherokee* v. *S. C. etc. Co.* (1879) 52 Ia. 279. A few courts, however, invariably exclude such evidence, as introducing collateral issues, since an investigation into the circumstances of the various sales is thus necessitated, which tends to confuse the jury and prolong the trial. *East Penn. R. R.* v. *Heister* (1861) 40 Pa. 53; *Pittsburg & Western R. R.* v. *Patterson* (1884) 107 Pa. 461; see *Jamieson* v. *Kings Co. Elevated Ry.* (1895) 147 N. Y. 322. Consequently, although there is a tendency to permit questions as to specific sales, on cross examination, to test the knowledge of the witness, *Chicago etc. Ry.* v. *Stewart* (1892) 47 Kan. 704; *cf. Shaw* v. *N. Y. Elevated Ry.* (1907) 187 N. Y. 186, the conclusion in the second principle case is the natural and logical result of the minority view, inasmuch as the obvious effect of admitting the questions would be to render unavoidable the investigation of the same collateral issues which would have been excluded as direct evidence. See *Bollman* v. *Lucas* (1888) 22 Neb. 796; 5 Harvard Law Rev. 232. The most salutary policy, however, is to refuse to adopt any stereotyped rule of absolute exclusion or admission, and to leave the determination of the question to the discretion of the judge. *Haines* v. *Fire Ins. Co.* (1872) 52 N. H. 467; *Teele* v. *Boston* (1896) 165 Mass. 88.

EVIDENCE—WITNESSES—IMPEACHMENT BY PROOF OF CHARACTER.—A witness was cross-examined as to an alleged act of misconduct, for purposes of impeaching her veracity. *Held,* the question was inadmissible, as it did not tend to reflect on the credibility of the witness. *State* v. *Reese* (Utah 1913) 135 Pac. 270; *Avery* v. *State* (Md. 1913) 88 Atl. 148. See Notes, p. 155.

INSURANCE—FORFEITURE—DEATH CAUSED BY BENEFICIARY.—A condition of an insurance policy in a benefit company stated that if the insured's death should be caused "directly or indirectly, intentionally or accidentally" by any beneficiary, the interest of such beneficiary should revert to the company. While insane, the beneficiary killed the insured. *Held,* the policy was forfeited. *Grand Circle Women of Woodcraft* v. *Rausch* (Colo. 1913) 134 Pac. 141.

In order to interpret the intentions of the parties with respect to such conditions in an insurance contract, considerable stress is necessarily laid upon the intention to prevent fraud, which is the primary purpose for the insertion of such clauses in the instrument. For this reason a condition which forfeits the policy if the insured commits suicide is not applicable when he kills himself while insane. *Eastabrook* v. *Union Mutual Life* (1866) 54 Me. 224. When, however, a similar policy embodies the words "sane or insane", it seems clear, despite some authority to the contrary, *Modern Woodmen of America* v. *Neely* (Ky. 1908) 111 S. W. 282; see Bacon, Benefit Societies & Life Ins. (3rd ed.) § 329, that the intention of the insured to cause his own death is immaterial, inasmuch as it is evident that there was a further risk of unintentional suicide, which the insured was unwilling to as-

sume. *Clarke* v. *Equitable Life Ins. Co.* (C. C. A. 1902) 118 Fed. 374; *Moore* v. *Northwestern Mutual Life Ins. Co.* (1906) 192 Mass 468. In the principal case, therefore, inasmuch as the word "intentionally" would have been sufficient by itself to avoid the risk of fraudulent conduct on the part of the beneficiary, it is apparent that the addition of "accidentally" indicates a further intention of the parties to cover such a situation as that which arose in the principal case. See *Keefer* v. *Modern Woodmen of America* (1902) 203 Pa. 129; but see *Penfold* v. *Universal Life Ins. Co.* (1881) 85 N. Y. 317.

INTERSTATE COMMERCE—COMMERCIAL AGENCIES—STATE TAXATION.—Attorneys on the guaranteed list of a foreign corporation reported directly to subscribers who inquired concerning the credit of local merchants. To avoid payment of a state license tax, the corporation urged that it was exempt because information occasionally was sent to subscribers outside the state. *Held,* it was not engaged in interstate commerce. *U. S. Fidelity & Guaranty Co.* v. *Kentucky* (1913) 34 Sup. Ct. Rep. 122. See Notes, p. 147.

INTERSTATE COMMERCE—INSURANCE.—In an action by a New York insurance company to recover the amount of a tax laid by the state of Montana upon the excess of its receipts over its disbursements in the defendant county, the plaintiff showed that the insurance contracts were uniformly effected at its home office in New York and the policies sent direct to the insured in Montana, that the loans and payments on the policies were made from the New York office, and premiums remitted there or paid to the company's cashier in Montana for deposit subject to withdrawal by the company. *Held,* the plaintiff was not engaged in interstate commerce, and therefore could not object to payment of the tax in question. *N. Y. Life Ins. Co.* v. *Deer Lodge County* (U. S. Sup. Ct., Dec. 1913). Not yet reported. See Notes, p. 149.

LIMITATION OF ACTIONS—APPLICATION OF STATUTORY EXCEPTIONS TO LIMITATIONS IN STANDARD FIRE INSURANCE POLICY.—In an action on a standard fire insurance policy the insurer alleged that the action was not commenced within the time stipulated in the contract. *Held,* the contractual limitation is, in legal effect, a statutory limitation, inasmuch as the form of policy is fixed by statute, and therefore the general statutory exceptions to the Statute of Limitations apply. *O'Neil* v. *Franklin Fire Ins. Co.* (N. Y. App. Div. 1913). Not yet reported.

Sect. 414, subd. 1 of the Code of Civil Procedure declares that the "provisions of this chapter (ch. IV) apply and constitute the only rules of limitations appliable to a civil action . . . except in one of the following cases (1). A case where a different limitation is specially prescribed by law, or a shorter limitation is prescribed by the written contract of the parties." In construing the equivocal language of this section, the courts have held that the provisions referred to are only those which prescribe periods of time within which actions must be commenced, *Hayden* v. *Pierce* (1895) 144 N. Y. 512, and in this manner have extended the force of the other sections to special limitations not prescribed by Chapter IV. The probable legislative intent was thus carried out, since the general nature of such other provisions made them applicable to all real statutory limitations. *Hayden* v. *Pierce, supra; Titus* v. *Poole* (1895) 145 N. Y. 414; *Ackerman* v. *Ackerman* (1910) 200 N. Y. 72. But by such a construction the

courts were not constrained to impose these sections upon limitations which were the expression of the intention of the parties and not of legislative policy. 13 Columbia Law Rev. 338; but see *Hamilton* v. *Royal Ins. Co.* (1898) 156 N. Y. 327; *cf. Gough* v. *McFall* (N. Y. 1898) 31 App. Div. 578. The fact that the form of contract used is prescribed by statute does not render such provisions applicable, because the court still construes the intention of the parties. It is submitted, therefore, that the clause of the contract in question should be treated as imposing a condition precedent to the maintenance of an action by the insured, requiring strict compliance with its terms. See *Williams* v. *Fire Assn. of Philadelphia* (N. Y. 1907) 119 App. Div. 573; *Riddlesbarger* v. *Hartford Ins. Co.* (1868) 7 Wall. 386; *Sullivan* v. *Prudential Ins. Co.* (1902) 172 N. Y. 482.

LIMITATION OF ACTIONS—DAMAGES—FLOODING OF LANDS.—The raising of a structure on the defendant's dam caused periodic overflows onto the plaintiff's bathing beach. *Held,* no permanent injury having been shown, a cause of action accrued as each injury was inflicted, from which time the Statute of Limitations would run, and subsequent damages and causes of action were not barred by a recovery for the first injury. *Deffenbaugh* v. *Washington Water Power Co.* (Idaho 1913) 135 Pac. 247.

For a full discussion of the principles applicable to this case, see 7 Columbia Law Rev. 277.

MORTGAGES—ANTECEDENT INDEBTEDNESS—BONA FIDE PURCHASE.—The plaintiff brings this suit to cancel a mortgage given to secure an antecedent indebtedness, on the ground that the mortgagor had fraudulently induced her to release her homestead rights. *Held,* since the defendant had extended the time of payment of the debt, he was constituted a *bona fide* purchaser for value. *Hunt* v. *Hunt* (Ore. 1913) 134 Pac. 1180.

While, of course, a mortgage given to secure a pre-existing indebtedness is sufficient to support the instrument as between the parties, the great weight of authority holds that a mortgage based on such consideration does not constitute the mortgagee a *bona fide* purchaser for value so as to entitle him to protection against outstanding equities of which he had no notice. *Banks* v. *Law* (1885) 79 Ala. 319; see *Adams* v. *Vanderbeck* (1887) 148 Ind. 92; but see *Partridge* v. *Smith* (1869) Fed. Cas. No. 10787. The reason for this holding is that the purchaser has parted with nothing of value. If, however, as in the principal case, he is placed in a worse condition than he was before, as by extending the time of payment, he is universally protected. *Thames & Co.* v. *Rembert's Admr.* (1897) 53 Ala. 561; *O'Brien* v. *Fleckenstein* (1905) 180 N. Y. 350. Therefore, a sound distinction may be drawn between a conveyance and a mortgage: the latter is simply given to secure the debt and to give the creditor a better remedy, so that he is not in any degree prejudiced by the transaction, but when in consideration of an absolute conveyance the creditor discharges the debt, he thereby completely destroys his right. *Gassen* v. *Hendrick* (1887) 74 Cal. 444; see *State Bank* v. *Frame* (1892) 112 Mo. 502; but see *Lillibridge* v. *Allen* (1897) 100 Ia. 582. This distinction explains many cases frequently cited in the text books as contrary to the general rule. See 1 Jones, Mortgages (6th ed.) 460; 2 Pomeroy, Eq. Juris. (3rd ed.) 749.

MUNICIPAL CORPORATIONS—ESTOPPEL—RECITAL IN BONDS.—A Colorado statute authorized a town to issue bonds by ordinance. The bonds recited that they were issued in compliance with the enabling act and in pursuance of an ordinance, but the latter was in fact void for lack of publication. *Held,* this recital imported that all conditions precedent had been performed, and the municipality was estopped from proving its falsity in a suit on the bonds. *Town of Aurora* v. *Gates* (C. C. A. 1913) 208 Fed. 101.

This is the view expressed in 13 Columbia Law Rev. 152, criticising the case of *Town of Aurora* v. *Hayden* (Colo. 1912) 126 Pac. 1109.

MUNICIPAL CORPORATIONS—MONEY DUE CONTRACTORS—RIGHTS OF SUB-CONTRACTORS.—A municipal contract for a public improvement provided that the city could retain part of the money due thereon until the contractor furnished satisfactory evidence that he had paid all of his sub-contractors. *Held,* a sub-contractor could not maintain an equity suit against the city to recover the money thus retained. *Lombard Governor Co.* v. *Mayor, etc., of Baltimore* (Md. 1913) 88 Atl. 140.

Since the city could not be sued upon the obligation of the contractor to the sub-contractors in the absence of any express assumption, it must be presumed to have inserted such a stipulation exclusively for their benefit, *State* v. *Liebes* (1898) 19 Wash. 589; *Merchants etc. Bank* v. *Mayor* (1884) 97 N. Y. 355; *cf. Mansfield* v. *Mayor* (1900) 165 N. Y. 208, and if the money has been set aside the municipality is in fact a trustee for the material men. Though this doctrine has been contested on the ground that such contracts are *ultra vires,* see *Lesley* v. *Kite* (1899) 192 Pa. 268, there is high authority that a city owes a moral duty to the sub-contractors, and no contract recognizing this would be *ultra vires.* Cooley, C. J. in *Knapp* v. *Swaney* (1895) 56 Mich. 345. But until the money has been set aside, there is no *res* which could be the subject of a trust. Until this event, therefore, no recovery should be allowed in equity. But see *Merchants etc. Bank* v. *Mayor, supra; State* v. *Liebes, supra; cf. Luthy* v. *Wood* (1878) 6 Mo. App. 67. It is sometimes suggested that the sub-contractor should have a right of action at law in jurisdictions where the beneficiaries of a contract made by the city can sue thereon. *Gorrell* v. *Greensboro Water Supply Co.* (1899) 124 N. C. 328; *Rochester Tel. Co.* v. *Ross* (N. Y. 1908) 125 App. Div. 76. But the rule itself is often repudiated, *Hone* v. *Water* Co. (1908) 104 Me. 217, and as the policy upon which it rests is in this class of cases outweighed by the consideration that the government machinery should not be hampered by the collection of private debts, *Columbia Brick Co.* v. *District of Columbia* (1893) 1 App. D. C. 351; *cf. City of Albany* v. *Lynch* (1904) 119 Ga. 491; *Wallace* v. *Lawyer* (1876) 54 Ind. 501, there is, therefore, no practical basis for the extension, and in fact there has never been a decision recognizing a right of action at law.

NEGOTIABLE INSTRUMENTS—FORGED BILL OF LADING ATTACHED TO DRAFT—LIABILITY OF INDORSEE.—In partial reliance upon forged bills of lading attached to, but not mentioned in a draft, the plaintiff drawee paid the draft to the defendant indorsee and, when the bills proved fictitious, sued to recover the amount so paid. *Held,* the plaintiff could not recover, as the defendant was a *bona fide* holder for value, neither aware of the fraudulent character of the bills, nor a guarantor of their genuineness. *Springs* v. *Hanover National Bank* (1913) 209 N. Y. 224.

Money paid under a mistake of real facts may ordinarily be re-

covered, 2 Daniel, Negotiable Instruments (6th ed.) § 1226; 3 Randolph, Commercial Paper, § 1483 *et seq.*, and where the acceptance of a draft, to which forged bills of lading were attached, was not absolute, but expressly against such bills, a payment to the indorsee by the acceptor before either knew of the fraud could be recovered back by him. *Grotian* v. *Guaranty Trust Co.* (C. C. 1900) 105 Fed. 566. But, inasmuch as the ordinary effect intended by the attachment of bills of lading to a draft is not that they become a part thereof, but that payment or acceptance of the draft should be a condition precedent to the delivery of the goods, see Burdick, Sales (3rd ed.) § 115, the bills, though giving some credit to the draft, can be no more than collateral security, *Kaufman & Co.* v. *Bank of Milwaukee* (1870) 79 U. S. 181, the genuineness of which the indorsee does not guarantee. In conformity, therefore, with the policy not to permit any unnecessary impediment to negotiability, the risk should pass by acceptance; *First National Bank of Detroit* v. *Burkham* (1875) 32 Mich. 328; the innocent indorsee, therefore, even when expressly authorized to discount drafts only if they are accompanied by bills of lading, has no reason to suspect fraud, *Craig* v. *Sibbett & Jones* (1850) 15 Pa. 238, and provided instruments purporting to be bills of lading are attached, is not required to look further. *Young & Son* v. *Lehman, Durr & Co.* (1879) 63 Ala. 519. It follows that the indorsee, as a *bona fide* holder who cannot be defeated by a plea of failure of consideration, *Robinson* v. *Reynolds* (1840) L. J. 9 C. L. 249, can compel the acceptor to pay the draft at maturity, *Goetz* v. *Bank of Kansas City* (1886) 119 U. S. 551, for though the latter is admitted to be an innocent party, the court cannot go behind his contract of acceptance.

Real Property—Invalid Incumbrance of Homestead—Effect of Abandonment.—A mortgage on homestead-land was not joined in by the mortgagor's wife. *Held*, it was a nullity, and a subsequent abandonment of the homestead did not impart validity to it. *Gay* v. *Fleming* (Ala. 1913) 62 South. 523.

In a majority of jurisdictions, failure to comply with the statutory requirements of the joinder or consent of the wife renders null and void any attempted alienation of land which is subject to the homestead exemption, and a subsequent abandonment of the homestead does not cure the defect, *Pipkin* v. *Williams* (1893) 57 Ark. 242; *Alford* v. *Lehman, Durr & Co.* (1884) 76 Ala. 526, as the conditions obtaining at the time of the execution of the deed or mortgage can alone determine its validity. *Cummings* v. *Busby* (1884) 62 Miss. 195. Moreover, the grantor is not estopped from questioning the rights of the grantee. *Powell* v. *Patison* (1893) 100 Cal. 236; *Abell* v. *Lothrop* (1875) 47 Vt. 375. In a number of states, however, such a deed, while not affecting the homestead rights of the wife, see *Rhea* v. *Rhea* (Tenn. 1885) 15 Lea 527, either acts as a present grant of the husband's "reversionary interest" after the necessity for protecting the wife has ceased, *Smith* v. *Provin* (1862) 86 Mass. 516; see *Joyner* v. *Sugg* (1903) 132 N. C. 580, or is treated as a contract to convey the legal title upon termination of the homestead. *Jerdee* v. *Furbush* (1902) 115 Wis. 277. Some courts hold, on the other hand, that although the deed is unenforcible for any purpose so long as the homestead obtains, it will become operative upon a subsequent abandonment, *Chaffe & Sons* v. *McGehee & Co.* (1886) 38 La. Ann. 278, though in one state the abandonment must be in order to effectuate the grant, see *Strayer* v. *Dickerson* (1903) 205 Ill. 257, and in another

it will have effect only if made in the course of a *bona fide* acquisition of a new homestead. *Anderson* v. *Carter* (1902) 29 Tex. Civ. App. 240. Much of this conflict results, of course, from the varying provisions of the statutes; but in consideration of the fact that it is generally declared that a deed of the homestead shall have no validity, the preferable view is the one expressed in the principal case.

TAXATION—POLL TAXES—ROAD LABOR.—A statute required every able-bodied male citizen to work on the highways eight days out of each year, or to send a substitute or to pay $4 instead. *Held,* this did not impose a tax within the meaning of the constitutional restrictions on capitation taxes. *Mashburn* v. *State* (Fla. 1913) 62 So. 586.

Originally, compulsory labor on the highways was an ancient common law duty like compulsory militia service or jury service. See *State* v. *Rayburn* (1909) 2 Okla. Crim. 413; *State* v. *Wheeler* (1906) 141 N. C. 773. With changes in economic conditions, it became customary to allow the labor to be commuted for a sum of money; and finally, the more highly developed communities resorted only to taxation or assessments in order to provide suitable highways. See *State* v. *Sharp* (1899) 125 N. C. 628. But the old notions as to the nature of the duty to work on the highways or pay money in lieu thereof still persist under the changed conditions; for, although the courts realize that compulsory road labor is a burden in the nature of a tax, 1 Cooley, Taxation (3rd ed.) 16; *Short* v. *State* (1895) 80 Md. 392, yet they say that it is not a "tax" within the meaning of the word as used in the state constitutions and statutes. *State* v. *Rayburn, supra; Town of Pleasant* v. *Kost* (1863) 29 Ill. 490; *State* v. *Topeka* (1886) 36 Kan. 76. In so far as the term is to be construed in the light of conditions at the time of the enactment of the constitutional provisions, there is some justification for these holdings. But in view of the fact that taxes are not necessarily payable in money, *Proffit* v. *Anderson* (Va. 1894) 20 S. E. 887; 1 Cooley, Taxation (3rd ed.) 15, 16; see *People* v. *Mayor of Brooklyn* (1851) 4 N. Y. 419, 424, it is difficult to-day to see any practical distinction between the duty to pay taxes for public improvements and the duty to spend time and labor on those improvements; and the distinction is doubly difficult when the time and labor may be commuted for money. A few courts, consequently, have repudiated the distinction, *Hassett* v. *Walls* (1874) 9 Nev. 387; *Proffit* v. *Anderson, supra; cf. Inhabitants of Andover* v. *Inhabitants of Chelmsford* (1819) 16 Mass. 236, but these courts are greatly in the minority.

TORTS—ALIENATION OF AFFECTIONS—INJUNCTION.—In an action for the alienation of the affections of the plaintiff's husband by the defendant since July 1, 1906, the plaintiff applies for an injunction *pendente lite* to enjoin the defendant from continuing the acts charged. *Held,* injunction denied. *Hall* v. *Smith* (1913) 140 N. Y. Supp. 796.

Although alienation of affections in reality partakes of the nature of a continuing wrong, see 2 Addison, Torts (6th ed.) *591, still the gravamen of the common law action is the loss of the *consortium* and services of the spouse, *Bockman* v. *Ritter* (1898) 21 Ind. App. 250; *Nichols* v. *Nichols* (1898) 147 Mo. 387; see Burdick, Torts (2nd ed.) 273 *et seq.,* and the injury, therefore, constitutes a complete tort when committed. Moreover, while the alienation is generally attended with an enticement from the domicile, this is not a necessary incident so long as there is an actual severance of the marital relations. If, there-

fore, there is only a partial estrangement of the spouse, a future act is necessary to the foundation of a cause of action. *Cf. Bailey* v. *King* (1900) 27 Ont. App. 703; *Bockman* v. *Ritter, supra.* But if in the first instance the alienation is completely effected, then a continuing estrangement would not seem to give rise to a new cause of action, and, the wrong being completed, the Statute of Limitations would begin to run from that time. See *Hogan* v. *Wolf* (1890) 10 N. Y. Supp. 896. In the case of a partial or threatened alienation, the jurisdiction of equity is founded on the theory of the protection of a property right of the plaintiff to the *consortium* of the spouse, see *Ex parte Warfield* (1899) 40 Tex. Cr. 413, and the defendant will be enjoined from persisting in the indulgence of those acts, the continuation of which will effectuate a complete estrangement. See *Ex parte Warfield, supra.* Further, such redress is significant of the general attitude of the courts to discourage divorce and effect a reconciliation of the parties. Inasmuch, however, as it did not appear from the allegations in the main case that the defendant was engaged in violating any of the present rights of the plaintiff, and as the plaintiff's laches was unexplained, equity rightly declined to intervene.

TORTS—JOINT AND SEVERAL LIABILITY—APPORTIONMENT OF DAMAGES FOR BLOCKING OF STREAM.—A log jam, which resulted from the independent negligence of the defendant and of other parties, caused the overflow of the plaintiff's land. *Held,* recovery sustained against the defendant for the entire damage. *Johnson* v. *Irvine Lumber Co.* (Wash. 1913) 135 Pac. 217.

The commission of several torts, each complete in itself, does not produce a joint tort, because the apparently joint result of the acts, see *Chipman* v. *Palmer* (1879) 77 N. Y. 51, is in reality a divisible injury. See *Little Schuylkill Co.* v. *Richard's Admr.* (1868) 57 Pa. 142. No single defendant, therefore, should be compelled to pay for this combined injury, *Pulaski Coal Co.* v. *Gibboney Co.* (1909) 110 Va. 444; *Chipman* v. *Palmer, supra; contra, Day* v. *Louisville Coal Co.* (1906) 60 W. Va. 27, but liberal damages should, because of the difficulty of apportionment, be awarded against each tort feasor, see *Little Schuylkill Co.* v. *Richard's Admr., supra,* in proportion to the harm done by him. See *Tackaberry Co.* v. *Sioux City Service Co.* (Ia. 1911) 132 N. W. 945. Even in such cases equity will not hesitate to join the defendants when granting an injunction, *Warren* v. *Parkhurst* (1906) 186 N. Y. 45, but nevertheless follows the law as to the awarding of damages. *Miller* v. *Highland Ditch Co.* (1891) 87 Cal. 430. In the principal case, however, the several acts of negligence united to cause a third wholly distinct injury, which might not have happened but for the concurrence of the unlawful acts. See *Colegrove* v. *N. Y. & N. H. and N. Y. & H. R. R. Co.* (1859) 20 N. Y. 492. A party may be said to have contemplated incurring such extra liability when acting in a negligent manner; in spite, therefore, of the harshness of the rule which denies to parties *in pari delicto* the right to enforce contribution, *Chipman* v. *Palmer, supra,* the doctrine in the principal case is supported both in reason and by weight of authority. *Slater* v. *Mersereau* (1876) 64 N. Y. 138; *Carterville* v. *Cook* (1889) 129 Ill. 152; Cooley, Torts (3rd ed.) 246, 250; see N. Y. L. J., Jan. 12, 1914; *cf. Tackaberry Co.* v. *Sioux City Service Co., supra; contra, Lull* v. *Fox, etc. Co.* (1835) 19 Wis. *100.

WAGERING CONTRACTS—SPECULATION IN FUTURES—RECOVERY OF DEPOSIT FROM A STOCKBROKER.—The plaintiff deposited money with a broker as a margin on a transaction which did not contemplate any actual purchase of stock. He now sues to recover the amount, which had been lost by a fall in the market. *Held,* under the law of Iowa he could not recover. *Lamson Bros. & Co.* v. *Bane* (C. C. A. 1913) 206 Fed. 253.

The courts have uniformly held a contract such as that in the principal case to be a gambling transaction, *Ware* v. *Pearsons* (C. C. A. 1909) 173 Fed. 879, and have refused to enforce executory agreements of this nature. *First Nat. Bank of Lyons* v. *Oskaloosa Packing Co.* (1885) 66 Ia. 41. So, where the event on which the wager is based has not yet occurred, the law favors any act in disaffirmance of the contract, see *Jeffrey* v. *Ficklin* (1841) 3 Ark. *227, and allows a party to recover his deposit either from the other party, *Aubert* v. *Walsh* (1810) 3 Taunt. 277, or from a stakeholder. *Stephens* v. *Sharp* (1861) 26 Ill. 404; 11 Columbia Law Rev. 92. This right of repentance was apparently abrogated by the terms of the English statute (1845) 8 & 9 Vict., ch. 109, § 18, but has been wisely reaffirmed by judicial interpretation. *Varney* v. *Hickman* (1847) 5 C. B. 271; *Strachan* v. *Universal Stock Exchange,* L. R. [1895] 2 Q. B. 697; affd. L. R. [1896] A. C. 166; *cf. Hampden* v. *Walsh* (1876) L. R. 1 Q. B. D. 189. Many of our legislatures, on the other hand, realizing that the attack on this form of gambling can be most effectively directed against the professional, have expressly authorized the recovery of the deposit even after the result of the wager has been ascertained. See *Lyons* v. *Coe* (1900) 177 Mass. 382; *Van Pelt* v. *Schauble* (1903) 68 N. J. L. 638; *Lester* v. *Buel* (1892) 49 Oh. St. 240; N. Y. Penal Law § 994. But since the statute of Iowa, which was applied in the principal case, simply declares the gambling contract to be void without specifically providing for a recovery of the deposit, Iowa Code (1897) §§ 4965, 4967, the court treated the parties as *in pari delicto,* see *Merriam* v. *N. Y. Stock Exchange* (1886) 1 Pa. C. C. 478, and properly refused the plaintiff a right of action.

WATER AND WATERCOURSES—PERCOLATING WATERS—ACTION ON THE CASE.—A productive gas well on the plaintiff's land was rendered worthless by percolation of surface water into the gas-bearing sand through an abandoned well on the adjacent property of the defendant, as a result of the latter's failure to cover his well or otherwise prevent the injury. *Held,* the plaintiff had a right of action in case. *Atkinson* v. *Virginia Oil & Gas Co.* (W. Va. 1913) 79 S. E. 647.

The court in this case based the plaintiff's right of action upon an attempted analogy to cases of pollution. This line of decisions, however, seems until now to have been strictly confined to pollution by some noxious substance; but pure water is not in itself deleterious, and there is no common law duty on a land owner to restrain surface or percolating water. But see *Quinn* v. *Chicago B. & Q. Ry.* (1884) 63 Ia. 510; 8 Columbia Law Rev. 56. Moreover, the rule of the absolute liability of one who brings or accumulates water on his land by artificial means and allows it to percolate into his neighbor's land so as to cause damage, Burdick, Torts (2nd ed.) 63; *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330; *Pixley* v. *Clark* (1866) 35 N. Y. 520, is clearly inapplicable here. The general principle of *damnum absque*

injuria in cases of percolating water, however, apparently holds true only in the absence of negligence, see *Smith* v. *Kenrick* (1849) 7 Man. Gran. & S.* 515, for though a mine-owner is usually not responsible for water that gets into his neighbor's mine by gravitation or percolation, 2 Snyder, Mines, § 1051: see *Lord's Executors* v. *Carbon Iron Mfg. Co.* (1884) 38 N. J. Eq. 452, yet where the injury results from his negligence, either of commission or omission, he is liable. *Duff* v. *U. S. Gypsum Co.* (C. C. 1911) 189 Fed. 234; *Spadra Creek Coal Co.* v. *Eureka Anthracite Coal Co.* (Ark. 1912) 148 S. W. 644. Since a statute in the jurisdiction of the principal case prescribed a penalty for failure to properly plug an abandoned well, W. Va. Code of 1906, c-62d, the defendant owed a statutory duty, the violation of which was negligence *per se* and created a common law right of action in favor of the injured party.

WILLS—CONSTRUCTION—SATISFACTION OF LEGACIES OUT OF RESIDUARY REAL ESTATE.—After several pecuniary legacies, the testatrix left the rest and residue of her property to be divided among the three defendants. The net personal property at her death sufficed only to pay 40% of the sum provided for in the general legacies. *Held,* the general legacies should not be charged upon the residuary real estate. *Ingersoll* v. *Ingersoll* (N. Y. Sup. Ct. 1913) 80 Misc. 299.

Since the presumption is that a legacy shall not be paid out of the real property, *Harris* v. *Fly* (N. Y. 1839) 7 Paige Chanc. 421; *Lewis* v. *Darling* (1853) 16 How. 1, the testator's intent so to charge his real estate must be affirmatively established. Gardner, Wills, 581. And since a will is the expression of the testator's intent at the time of the making thereof, *Morris* v. *Sickley* (1892) 133 N. Y. 456; *Turner* v. *Gibb* (1891) 48 N. J. Eq. 526, any change in the nature of the property subsequent to the execution of the will would not affect the application of this rule to the distribution of the estate. These principles have been applied with logical strictness in New York, where the mere provision for blending of real and personal property in the residuary estate is held not to indicate an intention to charge general legacies upon the realty on failure of the personal estate, *Lupton* v. *Lupton* (N. Y. 1817) 2 Johnson Ch. 614; *Morris* v. *Sickley, supra,* in absence of extraneous circumstances showing a contrary wish. *Cf. McCorn* v. *McCorn* (1885) 100 N. Y. 511; *Briggs* v. *Carroll* (1889) 117 N. Y. 288; *Harris* v. *Fly, supra.* The English courts, however, Hawkins, Wills (2nd ed.) 345; *Greville* v. *Browne* (1859) 7 H. L. C.* 689, and the great majority of our courts, consider the provision for blending of realty and personalty in the residuary clause as of itself showing an intention of satisfying pecuniary legacies out of real estate. *Lewis* v. *Darling, supra; Corwine* v. *Corwine* (1874) 24 N. J. Eq. 579. It is submitted that the modern breakdown of the fundamental distinctions between real and personal property, coupled with the essential nature of the residuary estate as a residue remaining after payment of all legacies, bequests and devises specifically provided for, see *Lewis* v. *Darling, supra; Greville* v. *Browne, supra,* would seem to favor this construction.

WILLS—CONSTRUCTIVE PRESENCE OF WITNESS.—The testatrix, who was very ill, dictated a codicil to her will and signed it in the presence of her nurse, who attested it and carried it into the adjoining room, where Mrs. L., who had heard everything through a disused closed door, also signed as witness. Thereafter, the testatrix examined the paper and

said it was all right. *Held,* Mrs. L. did not sign in the presence of the testatrix. *McKee* v. *McKee's Ex'r.* (Ky. 1913) 160 S. W. 261.

Statutes requiring witnesses to sign in the presence of the testator, being peremptory and designed to prevent fraud, should be strictly construed. Yet courts are often torn between the fear of establishing dangerously broad precedents of interpretation and the desire to carry out the evident intention of a particular testator. So, although the general rule requires contiguity, with an uninterrupted view between testator and subscribing witness, they refuse to protect the heir-at-law if the testator was merely indifferent to the formal act, provided he could have seen with slight physical effort. *Aikin* v. *Weckerly* (1870) 19 Mich. 482; *Ellis* v. *Flannigan* (1912) 253 Ill. 397; *Mandeville* v. *Parker* (1879) 31 N. J. Eq. 242 and note. By a slight extension of these principles, moreover, some courts, when the witnesses retire for an instant from the direct line of vision to affix their signatures and immediately return to exhibit the completed document, regard these proceedings as an entirety and done within the intelligent control and "presence" of the testator. *Cunningham* v. *Cunningham* (1900) 80 Mich. 180; *Sturdivant* v. *Birchett* (Va. 1853) 10 Gratt. 67; but see *Calkins* v. *Calkins* (1905) 216 Ill. 458. The principal case, however, cannot be brought within even the broadest interpretation of the language, since the testatrix did not know that the witness was in the adjoining room, and her mere statement that she was glad it was all right could not add to the validity of the execution of the will. *Mendell* v. *Dunbar* (1897) 169 Mass. 74.